Supreme Court, U. S.
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80-425

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. A159

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INS., an Iowa Corporation; INVESTMENT SECURITIES COMPANY, an Iowa Corporation; WM. B. NORTON, Individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBER W. BAUMANN,

Petitioners,

v.

LEADVILLE CORPORATION, a Colorado Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

ARTHUR M. SCHWARTZ, P.C.
The Market Center
1650 Market Street
Denver, Colorado 80202
(303) 893-2500

QUESTION PRESENTED

Whether the Colorado Appeals Court denied Petitioners' rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by considering and basing their decisions on evidence erroneously included in the record on appeal after Petitioners sought to correct and modify the record to conform with the evidence at trial.

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Petitioners,

v.

LEADVILLE CORPORATION, a Colorado Corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioners pray that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered May 19, 1980.

CITATION TO OPINION BELOW

This Petition seeks review of the Colorado Supreme Court decision in the case of *Charles W. Norton, et al. v.*

Leadville Corporation, No. 80 SC 91, denying Petitioners' Petition for Writ of Certiorari and affirming the decesion and order denying Petitioners' Motion for Conviction and Modification of the Record of the Colorado Court of Appeals, No. 78-714.

STATEMENT OF JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 19, 1980. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Whether the Colorado Appeals Court denied Petitioners' rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by considering and basing their decisions on evidence erroneously included in the record on appeal after Petitioners sought to correct and modify the record to conform with the evidence at trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services, in time

of war or public danger; nor shall any person be subject for the same offense to be twice put in jeapardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

§1. Citizenship defined—privileges of citizens—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners herein are stockholders in the Respondent corporation. In September, 1974, Respondent Corporation entered into an agreement with a company known as Day Mines, Inc. whereby the working interest in the mining properties held by Respondent Corporation would be leased to Day Mines for a term of twenty-five years. In or about January, 1975, the Petitioners, as shareholders of Respondent Corporation, were sent proxy materials notifying them of a special meeting called for the purpose of approving the agreement with Day Mines. The proxy material contained information concerning the rights of disesnting shareholders, and state, *inter alia*, as follows:

> If within such 30 day period such dissenting stockholders and Leadville fail to agree upon a fair value of shares, such dissenting stockholder may, within 60 days after the expiration of the 30 day period, file a petition in any court of competent jurisdiction in Lake County, Colorado, asking for a finding in determination of the fair market value of his shares.

At the special meeting held on February 7, 1975, the shareholders of Respondent Corporation ratified the Day Mines lease agreement. Petitioners were the only shareholders to dissent.

Petitioners, as dissenting shareholders, then proceeded to follow the procedure set forth by the Respondent Corporation in its proxy materials with respect to the right of dissenting shareholders. Accordingly, Petitioners instituted a statutory stock appraisal action on May 5, 1975, in the District Court in and for Lake County in reliance upon such information and in accordance with Section 7-5-113, Colorado Revised Statutes, 1973, (Appendix, p.), which specifies that venue for such action is to be in a court of competent jurisdiction in the county where the registered office of the corporation is located on the date the action is commenced.

After commencing this statutory appraisal action, Petitioners learned that Respondent Corporation's registered agent, who maintained his registered office in Lake County, had resigned from such position in or about December, 1974. It was also learned that Respondent Corporation did not appoint a new registered agent until May 12, 1975, whose registered office was established in Jefferson County, Colorado. Neither Respondent Corporation nor the former registered agent notified the Secretary of State of Colorado of the registered agent's resignation although at the time

the proxy materials were sent to the shareholders the Respondent knew that it had no registered agent or office in Lake County.

Promptly upon learning that Leadville Corporation had no registered office in Lake County on May 5, 1975, Petitioners moved to dismiss the statutory appraisal action on the ground that the Lake County District Court lacked jurisdiction over the subject matter of such action under Section 7-5-113 of the Colorado Revised Statutes, 1973, or, in the alternative for change of venue to the proper county as designated in the appraisal statute. The trial court denied these motions.

At trial of this matter held on April 20, 1978, discussion was had concerning the Petitioner's Motion to Dismiss and counsel for Petitioners tendered to the court a Certificate from the Colorado Secretary of State reflecting the status of Respondent Corporation's registered office and agent. From the following exchange, it is apparent that such exhibit was, however, never properly entered into evidence before the Court:

> MR. KLEIN: Your Honor, in regard to that motion to dismiss on the jurisdictional ground, I did point out in chambers that there was—I believe I did—a certificate of the Secretary of the State of Colorado which relates to whether or not the Leadville Corporation had a registered agent in Lake County on the particular date, and I would like to at least supplement the Court's file with that certificate.
>
> THE COURT: The Court has one in the file already, as of the December date. If you want to file it again, I guess you can. One more piece of paper in this file won't make any difference. I am satisfied that

in the course of reading the file last evening that I did find a certificate of standing from the Secretary of State.

MR. KLEIN: I have a different—

THE COURT: What these are are statements of change of registered office.

MR. KLEIN: The certificate I have, Your Honor, is dated December 27, 1977. May I tender that to the Court at this time and the record should reflect I have given a copy of that to counsel.

THE COURT: Any objection, Mr. Cosgriff?

MS. COSGRIFF: Your Honor, I haven't had an opportunity to review it and I would like to reserve any objection I have until I have had an opportunity to look at it, particularly in the light of the previous statements that are already in the file.

THE COURT: You may reserve your right to object and we'll take that up after you have had a chance to review it.

No further action was taken on the objections of Mr. Cosgriff nor the admission of the certificate into evidence.

On May 2, 1978, the trial court entered its judgment valuing the Petitioners' shares in Respondent Corporation at $16,173.10 together with interest thereon from February 6, 1975. Petitioners timely appealed such judgment to the Colorado Court of Appeals challenging the trial court's subject matter jurisdiction over such action on the basis of the venue jurisdictional provisions of Section 7-5-113, Colorado Revised Statutes, 1973.

On or about September 28, 1978, the Clerk of the Lake County District Court certified and transmitted the record to the Colorado Court of Appeals. After conclusion of pleading by the parties, the Court of Appeals announced its judgment on December 28, 1979, affirming the trial court and finding that the Lake County District Court properly asserted subject matter jurisdiction over the action. (Appendix, p. 1). It is clear from the opinion of the Court of Appeals that its decision relied on the Certificate from the Colorado Secretary of State dated December 27, 1977.

Petitioners retained new counsel who entered his appearance on January 25, 1980 and simultaneously petitioned the court for an order enlarging the time in which to file a Petition for Rehearing, which enlargement of time was granted. Such Petition for Rehearing was timely filed by Petitioners' new counsel but denied by the Court of Appeals.

From the date of his entry of appearance into the case, Petitioners' new counsel conducted an extensive review and reconstruction of the action from the date of its commencement. Due to the volume of the pleadings in the trial court, geographical distance to the trial court and the unwillingness of prior counsel to cooperate and assist in such efforts, counsel did not discover certain errors and omissions in the record on appeal until March, 1980. Immediately upon such discovery, counsel for Petitioners filed a Motion for Correction and Modification of the Record on March 24, 1980 pursuant to Rule 10(e) of the Colorado Appellate Rules.

Petitioners' Motion for Correction and Modification of the Record (Appendix, p. 13) specifically sought exclusion of the Certificate of the Secretary of State dated December

27, 1977 on the grounds that such exhibit was erroneously included in the record as an exhibit attached to Petitioners' Motion to Dismiss. Petitioners further alleged that such error by the Clerk was substantially detrimental to their cause inasmuch as the Court relied on such certificate in finding that subject matter jurisdiction properly lay in the Lake County District Court. Petitioners further sought modification of the record to include certain documents erroneously and mistakenly omitted by prior counsel. Such Motion was denied by the Court of Appeals on March 26, 1980 (Appendix, p. 22).

Petitioners sought review of the Court of Appeals judgment and denial of their Motion for Correction and Modification of the Record by way of a Petition for Writ of Certiorari filed with the Colorado Supreme Court on March 24, 1980 (Appendix, p. 24). Such Petition was denied on May 19, 1980 (Appendix, p. 39). Thereafter, Petitioners requested an extension of time from this court to file their Petition for Writ of Certiorari, which extension was granted to and including September 15, 1980.

REASONS FOR GRANTING OF THE WRIT

PETITIONERS BELIEVE THAT THE EFFECT OF THE COLORADO APPELLATE COURTS' RULINGS RESULTS IN A DENIAL OF DUE PROCESS TO THEM IN THAT THOSE COURTS CONSIDERED A DOCUMENT WHICH WAS NEVER PROPERLY ADMITTED INTO EVIDENCE IN THE COURSE OF THE TRIAL PROCEEDING.

Petitioners believe that a combination of factors that occurred throughout the trial and appellate procedure has resulted in a denial of due process in that a document that was never properly admitted into evidence during the trial

procedure was made a part of the record for purposes of appeal. This is particularly disturbing in light of the fact that the document in question, never properly before the trial court, but subsequently considered on appeal, was crucial to the determination by the Appellate Courts that the trial court properly exercised its subject matter jurisdiction over the case.

Petitioners believe that they did all that was within their power immediately upon discovering the error to bring the matter to the attention of the appellate court so that a redetermination could have been made upon the evidence properly before the court, without consideration of the document never properly admitted into evidence.

The appellate courts denied these requests to modify and correct the record and to exclude from consideration the document never properly admitted into evidence, as a result of which, Petitioners believe that their rights to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution have been denied.

The Petitioners believe that this precise issue has not been squarely addressed by this Court. In view of the novelty of the question raised and the effect it has upon the due process issue raised herein, the Petitioners believe that this matter is an appropriate one for this Court to grant certiorari.

The issue raised herein has only been peripherally considered by various federal circuit courts. Those courts in construing Rule 10(e) of the Federal Rules of Appellate Procedure, which Rule is identical to Rule 10(e) of the Colorado Appellate Rules pursuant to which the Colorado Courts denied Petitioners' Motion to Correct and Modify

the Record, have stated that the purpose of Rule 10(e) is to allow an appellate court to conform the record on appeal to what happened in the trial court, not to what did not, and that it does not give the court the authority to admit on appeal any document which was not made a part of the record in the trial court. *Kellogg v. McBee*, 452 F.2d 134, 137 (7th Cir. 1971); *United States v. Smith*, 493 F.2d 906 (5th Cir. 1974); *Borden, Inc. v. Federal Trade Commission*, 495 F.2d 785 (7th Cir. 1974). These cases do not, however, require as a matter of due process that such correction and modification of the record be made where a document is included in the record on appeal by mistake or inadvertence nor do they address the obvious denial of due process where such correction and modification has been denied and judgment entered solely on the basis of the improper evidence.

Here the Colorado Courts relied solely on the Certificate of the Colorado Secretary of State dated December 27, 1977 relating to the status of Respondent Corporation's registered agent and office in holding that subject matter jurisdiction properly lay in the trial court. That the Courts failed to consider other evidence properly before the Court and included in the record on appeal is demonstrative of the crucial importance of the correction and modification of the record as so sought, and evidence of the substantial denial of Petitioners' due process rights by the denial of their Motion for Correction and Modification of the Record.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur M. Schwartz
ARTHUR M. SCHWARTZ, P.C.
1650 Market Street
The Market Center
Denver, Colorado 80202
Attorney for Petitioners

APPENDIX

EXHIBIT A

COLORADO COURT OF APPEALS

No. 78-714

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENT SECURITIES COMPANY, an Iowa corporation; WM. B. NORTON, individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESTLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMANN,

Plaintiffs-Appellants,

v.

LEADVILLE CORPORATION, a Colorado corporation,

Defendant-Appellee.

Not Selected For Publication Not To Be Cited As Precedent In Any Colorado Court.

Appeal from the District Court of Lake County

Honorable William L. Jones, Judge

DIVISION III

Opinion by JUDGE KELLY JUDGMENT AFFIRMED

Enoch, C.J., and Berman, J., *concur*

Gorsuch, Kirgis, Campbell, Walker & Grover
John S. Pfeiffer
Stephen Klein
Denver, Colordao

Attorneys for Plaintiffs-Appellants

Cosgriff, Dunn and French
Peter Cosgriff
Leadville, Colorado
Keller, McSwain, Wing & Maxfield
D. Elizabeth Wills
Denver, Colorado

Attorneys for Defendant-Appellee

The plaintiffs appeal from the judgment of the trial court fixing the fair value of their stock in the defendant corporation at 10¢ per share. Their sole argument here is that the trial court was without subject matter jurisdiction.

This action was commenced by the filing of a complaint in Lake County, Colorado, on May 5, 1975. The plaintiffs moved to dismiss, or alternatively for change of venue, asserting that the trial court lacked subject matter jurisdiction because the registered office of the corporation was in Denver County rather than in Lake County.

We agree with the plaintiffs that §7-5-113, C.R.S. 1973, vests exclusive subject matter jurisdiction over a statutory appraisal action in the county in which the corporation's registered office is located. *See Barber v. People*, 127 Colo. 90, 254 P.2d 431 (1953). The record reflects, however, that at the time of the commencement of this action, the registered office of the corporation was in Lake County.

The statute in effect at the time the action was commenced provided that a change of address of the registered office of a corporation became effective when it was filed by the secretary of state. Section 7-3-111 (4), C.R.S. 1973. Here, the record shows that the secretary of state recorded the change of the registered office to Denver County on May 12, 1975, seven days after the commencement of this action. Consequently, subject matter jurisdiction properly lay in Lake, not Denver County.

Plaintiffs' asserted failure to file a timely motion for new trial is immaterial here since subject matter jurisdiction may be raised at any time. *Peaker v. Southeastern Colorado Water Conservancy District,* 174 Colo. 210, 483 P.2d 232 (1971).

Judgment affirmed.

CHIEF JUDGE ENOCH and JUDGE BERMAN concur.

EXHIBIT B

COLORADO COURT OF APPEALS

No. 78-714

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENTS SECURITIES COMPANY, an Iowa corporation; William B. NORTON, Individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESTLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMANN,	Petition For Rehearing
Plaintiffs-Appellants,	
v.	
LEADVILLE CORPORATION, a Colorado corporation,	
Defendant-Appellee.	

Appeal from the District Court of Lake County

Honorable William L. Jones, Judge

DIVISION III

Opinion by JUDGE KELLY

Enoch, C.J., and Berman, J., concur

John C. Schaefer, Esq.
Supreme Court Registration No. 5072
220 Steele Park
50 South Steele Street
Denver, Colorado 80209
Telephone: 399-4633
Attorney for Plaintiffs-Appellants

ARGUMENT

COME NOW the above-named Plaintiffs-Appellants, by and through their counsel of record, and, pursuant to Rule 40 of the Colorado Appellate Rules they do hereby respectfully petition the Colorado Court of Appeals for a rehearing of the within matter as follows:

The Plaintiffs-Appellants respectfully submit that the Court has overlooked or misapprehended certain protions of the record in affirming the trial court's finding of fact that the registered office of Defendant-Appellee corporation was in Lake County as of the date of commencement of the action. While the Court properly considered the Secretary of State's Certificate dated December 27, 1977 indicating a change of the registered office to Denver County on May 12, 1975, the Plaintiffs-Appellants argue that such document should not be and is not determinative of ultimate factual issue, especially when other portions of the record controvert the information contained therein.

Specifically, the Court's attention is drawn toDefendant's Exhibit 2, the Agreement with Day Mines dated September 12, 1974, wherein the Defendant-Appellee's

Registered Agent, Rudie Schaffer, executed same in his capacity as Secretary. The cover sheet of Defendant's Exhibit 3, dated January 6, 1975, however, designates Mr. Robert Knecht as "Secretary". Further, on Page 10 of Defendant's Exhibit 3, the last paragraph under the heading of "Business and Properties of Leadville", "General" reads as follows:

> The offices of Leadville were located in Leadville, Colorado, P.O. Box 960. Its present offices are located at 1677 Wadsworth Blvd., Lakewood, Colorado 80215 and its telephone number is (303) 237-1395. (Emphasis added.)

An identical statement concerning the change of (registered) offices of the Defendant-Appellee to Lakewood, Colorado is set forth on Page -1- of Defendant's Exhibit 4 found at the second paragraph of Paragraph (a) of "Item 1. Business". Defendant's Exhibit 4, the Securities and Exchange Commission Annual Report, Form 10-K, is for the fiscal year ending December 31, 1974. Further, found under Item 12 of Defendant's Exhibit 4 entitled "Directors of the Registrant" is the name of Robert Knecht who is listed as Vice-President, Secretary, and Treasurer "since 1974". (Emphasis added. The itemizations of officers of the Defendant-Appellee in both Defendant's Exhibits 3 and 4 do not contain the name of Rudie Schaffer.

It is respectfully asserted that the above-quoted matters of fact contained within the record clearly support the Plaintiffs-Appellants' position that the nominal registered agent, Rudie Schaffer, was, in fact, replaced as Secretary of the Defendant-Appellee prior to December 31, 1974, that Rudie Schaffer no longer acted as an officer of the Defendant-Appellee after December 31, 1974 and that, importantly, the office of the Defendant-Appellee was

changed from a post office box in Lake County, Colorado to 1677 Wadsworth Boulevard, Denver, Colorado on or before December 31, 1974. Likewise established is the fact that the Defendant-Appellee properly informed the supervising agency of the United States government, its shareholders, and the general public of Mr. Schaffer's disassociation with the Defendant-Appelle and Mr. Knecht's assumption of his duties no later than January 6, 1975. The Defendant-Appellee, however, conveniently failed to notify the Secretary of State of the change of registered agent and registered office until May 12, 1975, one hundred twenty-four days after advising its shareholders and one week after the expiration of the deadline for the filing of the within action.

It is well established that courts have generally estopped corporations from denying jurisdiction on the basis of service of process on persons alleged by a corporation not to be an agent of the corporation authorized to receive service when the corporation denying jurisdiction has failed to make timely and proper disclosure or filings relating to the designation of persons authorized to receive process. Cf. *Kraus v. Treasure Belt Mining Co.*, 408 P2nd 151 (Mont., 1961); *Hamilton v. Lionhead Skilift, Inc.*, 363 P2nd 716 (Mont., 1961); *Oro Navigation Co. v. Superior Court*, 187 P2nd 444 (Calif., App., 1948); *Anderson v. U.S.*, 220 F. Supp. 769 (e.d. Penn., 1963); and *Royal Business Funds Corp. v. South Eastern Development Corp.*, 323 S.E. 2nd 215 (N.C. App. 1977). Likewise, it is argued that the Defendant-Appellee herein should be estopped to deny the obvious change of registered office and registered agent prior to December 31, 1974 in its continuing assertion that subject matter jurisdiction lies in Lake County because its offices were located in Leadville on May 5, 1975. Equity should not permit the Defendant-Appellee to profit from its calculated tardiness in notifying the Secretary of State

of Colorado of the appointment of Mr. Knecht as its registered agent and the simultaneous changing of its registered office to 1677 Wadsworth Boulevard, Denver, Colorado 80215, especially when the record contains numerous admissions in Defendant-Appellee's own exhibits that the change of office and agent occurred prior to December 31, 1974.

The Plaintiffs-Appellants also respectfully assert that the Court has misapprehended the applicable statutory section. Section 7-3-111 (4) C.R.S. 1973 pertains to the procedure which may be followed by a registered agent who changes his business address. The facts disclosed from the record indicate that the registered agent, Rudie Schaffer, did not change his business address, but, rather, that said registered agent resigned prior to December 31, 1974. Accordingly, Section 7-3-111 C.R.S. 1973 applies.

The Court's attention is respectfully drawn to the first line of the said sub-Section (3) where the legislature utilized the permissive word "may rather than the mandatory word "shall". The use of such auxiliary verb, it is argued, implies that the Court may recognize other methods of resgination of a registered agent. Accordingly, the Secretary of State's Certificate of December 27, 1977 is not determinative of the identity of the registered agent or the location of the registered office. Rather, it is but one indication which the Court may examine to determine whether or not a resignation has occurred, who the actual registered agent is, or where the actual place of the registered office may be as of any particular date. The Secretary of State's records being, in essence, "controlled" by the actions of the Defendant-Appellee, the Court is urged to minimize the factual statements therein contained and, instead, rely for its factual determination upon Defendant's Exhibits 3 and 4

wherein Mr. Schaffer's name and address are conspicously [sic] absent.

In the event that the Court declines to exercise its fact-finding prerogative with regard to the portions of the record quoted above, then it is argued that the discrepancies between the quoted portion of Defendant's Exhibits 3 and 4 and the Secretary of State's Certificate of December 27, 1977 demonstrate an unresolved conflict of evidence requiring the remanding of the case to the trial court for the purpose of receiving additional evidence and entering its finding of fact concerning the actual registered office as of May 5, 1975. During such further proceedings, the Plaintiffs-Appellants would be prepared to offer further proof concerning the resignation of Rudie Schaffer as Secretary and registered agent of the Defendent-Appellee prior to December 31, 1974, as to the assumption of the duties of secretary, treasurer, vice-president and registered agent by Mr. Robert Knecht prior to December 31, 1974 and the consequent change of registered office of the Defendant-Appellee from Lake County to 1677 Wadsworth Boulevard, Denver, Colorado 80215 prior to December 31, 1974. Upon such remanding, the Plaintiffs-Appellants also offer to introduce competent evidence to establish that Rudie Schaffer, on May 5, 1975, had exited permanently from the State of Colorado and had established a permanent residence and office within the State of Illinois. Under those circumstances, pursuant to Section 7-3-112 (2) C.R.S. 1973, the Secretary of State would then be properly regarded as an agent for the Defendant-Appellee and the office of the Secretary of State within the City and County of Denver would properly be regarded as Defendant-Appellee's office.

Because the actual location of the office of the Defendant-Appellee is crucial to determine the threshold question of subject matter jurisdiction, the Court is respectfully

requested to re-examine Defendant's Exhibits 2, 3, and 4 within the record and to balance the admissions contained therein against the Secretary of State's Certificate of December 27, 1977. The Court is urged to consider such admissions determinative of the factual question of the location of the office of the Defendant-Appellee on May 5, 1975, or, in the alternative, to issue its Mandate directing the trial judge to hold a hearing and receive all available evidence in order that a proper factual determination can be made.

DATED this 11th day of February, 1980.

John C. Schaefer, Esq.
Supreme Court Reg. No. 5072
220 Steele Park
50 South Steele Street
Denver, Colorado 80209
Telephone 399-4633
Attorney for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of February, 1980, a true and correct copy of the foregoing Petition for Rehearing was served upon counsel for all parties by placing same in the United States mails, first class, postage prepaid, and properly addressed to:

Peter Cosgriff, Esq.
Cosgriff, Dunn, and French
P.O. Box 11
Leadville, CO 80461
Keller, McSwain, Wing and Maxfield
2570 First of Denver Plaza Building
633-17th Street
Denver, CO 80202

Phylis J. Morgan—Facsimile

EXHIBIT C

IN THE COURT OF APPEALS OF THE

STATE OF COLORADO

No. 78-714

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENTS SECURITIES COMPANY, an Iowa corporation; William B. NORTON, Individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES & LESLIE LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAN N. BAUMANN and ROBERT W. BAUMANN	)
vs.	)
LEADVILLE CORPORATION, a Colorado corporation,	)
Defendants-Apellees.	)

ORDER

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. Unless otherwise ordered MANDATE will issue March 6,

1980. BY THE COURT, JUDGE KELLY, ENOCH, C.J. AND BERMAN, Jr.

Date February 28, 1980.

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

EXHIBIT D

COLORADO COURT OF APPEALS

No. 78-174

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENTS SECURITIES COMPANY, an Iowa corporation; William B. NORTON, Individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESTLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMANN,	Motion For Correction and Modifciation Of The Record
Plaintiffs-Appellants,	
vs.	
LEADVILLE CORPORATION, a Colorado Corporation,	
Defendant-Appellee.	

COME NOW the Plaintiffs-Appellnats above-named, by and through their counsel of record, John C. Schaefer, Esq., and pursuant to Rule 10 (e) of the Colorado Appel-

late Rules, they do hereby respectfully move the Colorado Court of Appeals to direct the Lake County District Court to correct an error in the record heretofore certified to the Colorado Court of Appeals by the clerk of the Lake County District Court on the 28th of September, 1978 and to permit the supplementation of the record thusly corrected and transmitted by the inclusion of certain additional pleadings and documents as hereinafter set forth; and, as grounds and reasons therefor, the Plaintiffs-Appellants would respectfully show unto the Court as follows:

1. That, on or about September 28, 1978, Ms. Margorie M. Schlaepfer, Clerk of the District Court of Lake County, Fifth Judicial District, certified and transmitted the record in the instant case.

2. That Item No. 3, so certified and transmitted to this Court, was the Plaintiff's Motion to Dismiss or in the Alternative For Change of Venue, with Exhibits "A" and "B" attached.

3. That paragraph 2 on page 3 of such pleading (Folio 22) clearly and unequivocally refers to Exhibit "B" as correspondence concerning the individual plaintiff Charles W. Norton, from his physician.

4. That Exhibit "B" as attached to such pleading by the Clerk of District Court is not a letter from the individual plaintiff's physician; but, rather, a certificate from the office of the Secretary of State of the State of Colorado dated December 27, 1977.

5. That a physical inventory of the file contents of the Lake County District Court's records pertaining to the instant matter conducted March 20, 1980 by Plaintiffs-Appellants' counsel revealed the existence of plaintiff's

physician's letter within such record; and, likewise, reveals the existence of the original Secretary of State's certificate elsewhere within the records but, not adjacent to nor pertinent to the Plaintiffs' Motion to Dismiss or in the Alternative for Change of Venue.

6. That the Plaintiffs-Appellants respectfully assert that the purported Exhibit "B" was attached by the Clerk of the District Court to Plaintiffs' Motion to Dismiss or in the Alternative for Change of Venue in error; and, that the true Exhibit "B" was omitted from the record by error or accident.

7. That the Plaintiffs-Appellants respectfully assert that such error and omission by the Clerk of the Lake County District Court was substantially detrimental to their cause inasmuch as this court relied on the purported Exhibit "B" in finding that the subject matter jurisdiction lay in Lake, not in Denver County.

8. That, further, the Plaintiffs-Appellants respectfully submit that, through no fault of the Clerk of the Lake County District Court, several documents, pleadings and exhibits were omitted from the record as heretofore certified to this Court by the inadvertence, error, or accident of the Plaintiffs-Appellants' prior counsel of record.

9. Specifically, and of crucial importance and materiality to the Plaintiffs-Appellants argument are STATEMENT OF CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT, OR BOTH, OF LEADVILLE CORPORATION, Defendant's Exhibit No. 2 in the December 20, 1977 hearing on all motions conducted before the Trial Court, as well as the Affidavit of Service of Ramona Gutheinz filed with the Trial Court on May 19, 1975, both of which are attached hereto.

10. Defendant's Exhibit No. 2 clearly demonstrates Mr. Robert Knecht's assumption of the office of registered agent of the Defendant-Appellee as of April 24, 1975, together with the change of the registerd offic of the Defendant-Appellee to 1677 Wadsworth, Lakewood, Colorado (80215) as of April 24, 1975.

11. The Affidavit of Service of Process filed with the Court on May 19, 1975, the only affidavit of service of process for Plaintiffs' Complaint contained within the Court's files, clearly demonstrates that service of process on Mr. Knecht was subsequent to his execution of Defendant's Exhibit No. 2.

12. While not designated as part "Record" by Plaintiffs-Appellants' prior counsel, the crucial materiality of these two documents would seem obvious; and, the inclusion of same in the record is absolutely necessary as further support of the Plaintiffs-Appellants' position that Mr. Knecht had replaced Mr. Schaffer well prior to the commencement of the action and that the registered office of the Defendant-Appellee had been moved from Lake County to Jefferson County well prior to the commencemnt of the action and prior to service of process.

13. The Plaintiffs-Appellants additionally and respectfully urge the Court of Appeals to correct the omission of the following items from the record due to the mistake, inadvertence or error of Plaintiffs-Appellants' prior counsel

(A) Plaintiffs' Motion to Dismiss filed December 1, 1976; and

(B) Plaintiffs' Brief in Support of Motion to Dismiss filed December 23, 1976; and

(C) Plaintiffs' Amended Motion to Dismiss filed March 15, 1977; and

(D) Transcript of Court's hearing on Plaintiffs' Amended Motion to Dismiss held April 27, 1977; and

(E) Plaintiffs' Motion to Dismiss filed July 14, 1977; and

(F) Plaintiffs' Memorandum Brief in Support of Motion to Dismiss filed July 14, 1977; and

(G) Transcript of the Court's hearing on Plaintiffs' Motion to Continue and Motion to Dismiss held September 2, 1977; and

(H) Copy of the Deposition of Mr. Robert Knecht taken April 18, 1978.

14. That the Defendant-Appellee has refused to enter into a Stipulation regarding the correction and/or modification of the record.

15. That the Plaintiffs-Apellants respectfully state that they are entitled to correction of the District Court Clerk's error in attaching the wrong Exhibit "B" to the Plaintiffs' Motion to Dismiss or in the Alternative for Change of Venue as a matter of law.

16. That Plaintiffs-Appellants respectfully urge the Court of Appeals to exercise its discretion in otherwise permitting the inclusion of documents, pleadings and exhibits heretofore omitted from the record as designated by their prior counsel in order that substantial injustice may be prevented.

WHEREFORE, for the grounds and reasons above-

stated, the Plaintiffs-Appellants respectfully pray for correction and supplementation of the record as hereinabove set forth, and for such other and further relief as the Court may deem appropriate in the premises.

John C. Schaefer—Facsimile

John C. Schaefer, Esq.
Attorney Reg. No. 5072
Attorney for Plaintiffs-Appellants
50 South Steele Street
Suite 220
Denver, Colorado 80209
Telephone: 399-4633

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of March, 1980 a true nad correct copy of the foregoing Motion for Correction and Modification of the Record was served on counsel for all parties by placing same in the United States mails. first class, postage prepaid and properly addressed to:

Messrs. Peter Cosgriff, Esq. and
Timothy Berry, Esq.
Cosgriff, Dunn & French
P.O. Box 1
Leadville, Colorado 80461

Ms. D. Elizabeth Wills
Keller, McSwain, Wing & Maxfield
633 17th Street
Suite 2470
Denver, Colorado 80202

Katherine E. Raue—Facsimile

State of Colorado)
) SS
City & County of Denver)

RAMONA GUTHEINZ, the affiant, being sworn, says: that affiant is over the age of eighteen years and is not a party to this action; and that affiant has duly served the within by * handing to and leaving with ROBERT A. KNECHT, registered agent for LEADVILLE CORPORATION, a true and correct copy of the within Summons, along with a true and correct copy of Complaint attached thereto, at 1677 Wadsworth Boulevard, City of Lakewood, County of Jefferson, State of Colorado, May 8, 1975 at 9:03 A.M.

Ramona Gutheinz—Facsimile

Subscribed and sworn to before me this 8 day of May, 1975.
My Commission expires: July 12, 1975.
/s/underchipherable name
Notary Public

STATEMENT OF CHANGE OF REGISTERED OFFICE
OR REGISTERED AGENT, OR BOTH,
OF
LEADVILLE CORPORATION

To The Secretary of State
of the State of Colorado

Pursuant to the provisions of the Colorado Corporation Act, the undersigned corporation, organized under the laws of the State of Colorado submits the following statement for the purpose of changing its registered office or its registered agent, or both, in the state of Colorado.

First: The name of the corporation is Leadville Corporation

Second: The address of its previous REGISTERED OFFICE was P.O. Box 960, Leadville, Colorado

Third: The address to which its REGISTERED OFFICE is to be changed is 1677 Wadsworth, Lakewood, Colorado 80215

FOURTH: The name of its previous REGISTERED AGENT was Rudie Schaffer

Fifth: The name of its successor REGISTERED AGENT is Robert Knecht

Sixth: The address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

Seventh: The address of its place of business in Colorado is 1677 Wadsworth, Lakewood, Colorado 80215

Dated: April 24, 1975
Leadville Corporation (Note 1)
By Robert A. Knecht (Note 2)
as vice president

STATE OF Colorado
County of Jefferson

Before me, ROBERT P. LATHAM, a Notary Public in and for the said County and State, personaaly appeared Robert A. Knecht who acknowledged before me that he is the vice-president of Leadville Corporation, a Colorado Corporation, that he signed the foregoing, and that the statements contained therein are true.

In witness whereof I have hereunto set my hand and seal his 30 day of April. A.D. 1975.

My commission expires June 6th, 1976
Robert P. Latham—Facsimile

NOTES: 1. Exact corporate name of corporation making statement.

2. Signature and title of officer signing fo rthe corporation—must be President or Vice-President.

Signature of Notary Public must be exactly as shown on Notarial Seal, and must agree with notarial commission.

EXHIBIT E

COLORADO COURT OF APPEALS

No. 78-714

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENTS SECURITIES COMPANY, an Iowa Corporation; WM. B. NORTON, individually nad as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMAN,	ORDER
Plaintiffs-Appellants,	
v.	
LEADVILLE CORPORATION, a Colorado corporation,	
Defendant-Apellee.	

The court has considered the motion of plaintiffs-appellants for correction and modification of the record, and the response thereto, and has examined its file herein,

and, since it appears that the opinion in this case was announced December 28, 1979, and petition for rehearing was denied on February 28, 1980, and that, therefore, the motion to correct and modify the record in this case is not timely,

IT IS ORDERED that the motion be and it is hereby DENIED.

BY THE COURT: Kelly, J.
Enoch, C.J.
Berman, J.

Date: March 26, 1980

EXHIBIT F

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

No. _____

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa corporation; INVESTMENTS SECURITIES COMPANY, an Iowa Corporation; WM. B. NORTON, individually nad as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLIK; CHARLES WESLEY NORTON and MACINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMAN,

Petitioners,

vs.

LEADVILLE CORPORATION, a Colorado Corporation,

Respondent.

Petition For Writ
Of Certiorari
No. 78-714

PETITION FOR WRIT OF
CERTIORARI

John C. Schaefer, Esq.
Supreme Court Reg. No. 5072
Attorney for Petitioners
50 South Steele Street
Suite 220
Denver, Colorado 80209
Telephone: 399-4633

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

No. _____

CHARLES W. NORTON and RUBY NORTON: CHARLES W. and RUBY W NORTON, INC., An Iowa Corporation; INVESTMENT SECURITIES COMPANY, an Iowa Corporation; WM B. NORTON, individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILLE YEDLIK and EDWIN G. YEDLICK; CHARLES WESTLEY NORTON and MAXINE M. NORTON; CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON; MIRIAM N. BAUMANN and ROBERT W. BAUMANN,	Petition For Writ Of Certiorari
Petitioners,	
vs.	
LEADVILLE CORPORATION, a Colorado Corporation,	
Respondent.	

COME NOW the Petitioners above-named, by and through their counsel of record, John C. Schaefer, Esq., and they do hereby respectfully petition the Supreme Court

for the State of Colorado to exercise its judicial discretion and to issue its Writ of Certiorari in order that a review of the Colorado Court of Appeals judgment may be had; and, in support thereof, the Petitioners would respectfully show unto the Supreme Court as follows:

1. The Petitioners seek review of the unofficial report of the opinion and judgment of the Colorado Court of Appeals entered December 28, 1979 in Action No. 78-714 affirming the Lake County District Court's judgment entered May 2, 1978 by the Honorable William Jones, Judge, holding that subject matter jurisdiction over Petitioners' statutory stock appraisal action properly lay in the Lake County District Court; and, the Petitioners further seek review of the order of the Court of Appeals entered on March 26, 1980 in said Action denying Petitioners' Motion for Correction and Modification of the Record pursuant to Rule 10(e) of the Colorado Appellate Rules.

2. That a true and correct copy of the Court of Appeals judgment, together with a true and correct copy of Petitioners' Motion for Correction and Modification of the Record and the Court of Appeals order denying same, and a true and correct copy of C.R.S., 1973 Section 7-3-111(4) is attached hereto in the Appendix, denominated Exhibits "A", "B", "C", and "D", respectively.

3. That the Colorado Court of Appeals denied the Petitioners' Motion for Rehearing by order dated February 28, 1980; and, that the Colorado Court of Appeals granted Petitioners' Motion for Stay of Issuance of Mandate, staying the issuance of Mandate through and including March 31, 1980, copies of which orders are attached hereto in the Appendix, denominated Exhibits "E", "F", and "G", respectively.

4. That the questions presented for review are:

(A) Is the date of filing of the statement of Change of Registered Office, Registered Agent, or Both by the Respondent Corporation with the Secretary of State (May 12, 1975) conclusive as to the factual issue of the location of the registered office of the Respondent Corporation on the date of commencement of the action (May 5, 1975)?

(B) Did the Court of Appeals properly deny Petitioners' Motion For Correction and Modification of the Record seeking to strike from the Record an exhibit mistakenly and erroneously included therein by the Clerk of the Lake County District Court and which denial excluded crucial evidence supporting the Petitioners' claim that documentary evidence and affidavits properly brought before the trial court do not support the Court's factual determination that subject matter jurisdiction properly lay in the Lake County District Court?

(C) In light of the facts and circumstances in evidence, did the Court of Appeals properly fail to adopt Petitioners' assertion that equity and justice require that the Respondent Corporation be estopped from asserting subject matter jurisdiction over Petitioners' statutory stock appraisal action in the Lake County District Court on the basis of its calculated failure to file a Notice of Change of Registered Office, Registered Agent, or Both with the Secretary of State until one week after the expiration of the time within which Petitioners' could initiate a statutory stock appraisal action and long after such changes had, in fact, been effectuated by Respondent Corporation as evidenced by statements attributable to the Respondent in the Record as certified by the Clerk of the District Court and as it should be supplemented pursuant to Rule 10 (e) of the Colorado Appellate Rules and Petitioners' Motion thereunder?

(D) Did the Court of Appeals properly find that subject matter jurisdiction lay in the Lake County District Court despite Petitioners' claim of non-suit in their statutory stock appraisal action and their repeated attempts to dismiss same pursuant to Rule 41 of the Coloardo Rules of Civil Procedure?

(E) Is the judgment of the Colorado Court of Appeals void by virtue of the inclusion in the Record on review of an erroneous exhibit and the Court of Appeals apparent reliance thereon in its factual determination of the basic issue?

5. This action was filed by the Petitioners in the Lake County District Court on May 5, 1975, the last day permitted under the statute for the commencement of a statutory stock appraisal action. The Petitioners, aware that the Respondent Corporation's nominal resident agent, Rudie Schaffer, had long since left the State of Colorado and resigned such position, effectuated service of process on his replacement, Mr. Robert Knecht, in Lakewood, Colorado no May 8, 1975. On that date, Mr. Knecht had already prepared and signed his Statement of Change of Registered Office, Registered Agent, or Both on April 24, 1975, acknowledging his status as registered agent of the Leadville Corporation and further acknowledging the change of such Corporation's registered office from Lake County to Jefferson County, although Mr. Knecht did not actually file same with the Secretary of State until three weeks later. There was no service of process on the Respondent in Lake County.

There occurred no activity in the case after Respondent's Answer and Counterclaim (sic) was filed for nearly eighteen months. Then, on December 1, 1976, the Petition-

ers withdrew their Notice of Election and Demand for Payment for Shares and filed their first Motion to Dismiss. The Petitioners filed their second Motion to Dismiss on March 15, 1977. Petitioners filed their third Motion to Dismiss on July 14, 1977. The Petitioners filed their fourth Motion to Dismiss on December 9, 1977. The Petitioners fifth and final Motion to Dismiss was argued immediately prior to trial. All Motions to Dismiss were denied and the Court, after trial on April 20, 1978, entered its judgment which is the subject of this appeal.

6. That there is no history of judicial interpretation of C.R.S., 1973. Section 7-3-111(4) (Appendix Exhibit "D") to date yielding direct precedent for the Court of Appeals' interpretation of that statute that the date of actual filing of a Statement of Change of Registered Office, Registered Agent, or Both with the Secretary of State is dispositive of the issue of where a corporation's registered office is located, in fact, for purposes of determining the District Court's subject matter jurisdiction over an action in which the corporation is a party and where, as held correctly by the Court of Appeals, jurisdiction is premised upon the location of the corporation's registered office, as of the date of commencement of the action (May 5, 1975). Where facts and circumstances known to the party denying such jurisdiction and admitted into evidence before the trial court indicate that the corporation's registered office is maintained at a place other than that so designated in its filings with the Secretary of State, and where the corporation relying on same to assert jurisdiction in an action repeatedly sought to be dismissed by Plaintiff shareholders intentionally failed to make such filing with the Secretary of State as would indicate the true location of its registered office until after the expiration of the time limit within which said shareholders could bring their action should such corporation not be estopped from contesting the

change of registered office to Jefferson County which occurred at least two weeks prior to the commencement of the action?

7. Petitioners further urge that this Court inquire by issuance of its Writ of Certiorari into the propriety of the Court of Appeals' denial of their Motion For Correction and Modification of the Record herein where such correction and modification is necessary to avoid substantial injustice resulting from that Court's obvious reliance on evidence improperly and erroneously before it and from the exclusion of other evidence crucial to the Petitioners' case.

8. Additionally, Petitioners urge this Court to inquire by issuance of its Writ of Certiorari into the equity and justice of the Court of Appeals' holding that subject matter jurisdiction was proper in the Lake County District Court where such jurisdiction was asserted by Respondent to prosecute an action which was the exclusive statutory remedy of the Petitioners' claim of non-suit and repeated attempts to dismiss such action pursuant to Rule 41 of the Colorado Rules of Civil Procedure.

9. The Petitioners respectfully submit that the Court of Appeals has overlooked and misapprehended certain portions of the Record in affirming the trial court's judgement and finding that the registered office of the Respondent Corporation was in Lake County as of the date of the commencement of the action. Petitioners argue that the Court of Appeals improperly considered the Certificate of the Secretary of State, dated December 27, 1977, indicating a change of registered office of the Leadville Corporation from Lake County to Jefferson County on May 12, 1975, in that said Certificate was mistakenly and erroneously included in the Record by the Clerk of the Lake County District Court as Exhibit "B" to Item No. 3,

Plaintiffs' Motion to Dismiss or in the Alternative for Change of Venue, as is more fully set forth in Petitioners' Motion For Correction and Modification of the Record (Appendix Exhibit "B"). Petitioners argue that the Court of Appeals' reliance on such Certificate in holding that subject matter jurisdiction properly lay in the Lake County District Court and its failure to consider other evidence in the record as certified, and as corrected and modified pursuant to the Motion of the Petitioners under Rule 10(e) of the Colorado Appellate Rules, is demonstrative of the crucial importance of the correction and modification of the record as so sought, and evidence of the substantial inequity and injustice to the Petitioners of the Court of Appeals' denial of their Motion. Petitioners assert that, as a matter of law, they are entitled to the correction and deletion of the erroneously included exhibit, and that the Court of Appeals' reliance on same in their Judgment renders same void.

Petitioners argue that, even if such Certificate was properly included in the Record, such document is not, as held by the Court of Appeals, determinative of the ultimate issue of whether subject matter jurisdiction properly lay in the Lake County District Court, especially when other portions of the record controvert the information contained therein.

Specifically, the Court's attention is drawn to Defendant's Exhibit 2, the Agreement between Respondent Corporation and Day Mines, dated September 12, 1974, wherein the Respondent's registered agent, Rudie Schaffer, executed same in his capacity as Secretary. The cover sheet of said agreement, Defendant's Exhibit 3, dated January 6, 1975, however, designates Mr. Robert Knecht as "Secretary". Further, on Page 10 of Defendant's Exhibit 2, the last paragraph under the heading of "Business and Properties of

Leadville, General" reads as follows:

> The offices of Leadville were located in Leadville, Colorado, P.O. Box 960. Its present offices are located at 1677 Wadsworth Blvd., Lakewood, Colorado 80215 and its telephone number is (303) 237-1395. (Emphasis added)

An identical statement concerning the change of (registered) offices of the Respondent to Lakewood, Colorado is set forth on Page 1 of Defendant's Exhibit 4, found in the second paragraph of Paragraph (a) of "Item 1. Business." Defendant's Exhibit 4, the Securities and Exchange Commission Annual Report, Form 10-K, is for the Respondent Corporation's fiscal year ending December 31, 1974. Further, found under Item 12 of Defendant's Exhibit 4 entitled "Directors of the Registrant" is the name of Robert Knecht listed as Vice President, Secretary and Treasurer "since 1974". (Emphasis added) The itemization of the officers of the Respondent in both Defendant's Exhibit 3 and 4 do not contain the name of Rudie Schaffer.

Moreover, as is evidenced by the Certificate of Service of Ramona Gutheinz, as sought to be included in the Record on Appeal by Petitioners' Motion for Correction and Modification of the Record (P. 6, Appendix Exhibit "B"), the only service of process in this action was had on Robert Knecht, as registered agent of the Respondent Corporation, at 1677 Wadsworth Boulevard, Lakewood, Colorado (80215) on May 8, 1975, subsequent to his execution of Respondent's Statement of Change of Registered Office, Registered Agent, or Both (P. 7, Appendix Exhibit "B"), clearly indicating Mr. Knecht's assumption of the office of registered agent of the Respondent Corporation as of April 24, 1975, together with the change of the registered office of the Respondent Corporation to 1677 Wads-

worth Boulevard, Lakewood, Colorado (80215) as of April 24, 1975.

It is respectfully asserted that the above-quoted facts contained within the Record as certified and as necessarily corrected and modified clearly support the Petitioners' position that the nominal registered agent, Rudie Schaffer, was, in fact, replaced as Secretary of the Respondent prior to December 31, 1974, that he no longer acted as registered agent or an officer of the Respondent after Decembr 31, 1974 and that, importantly, th registered office of the Respondent was changed from a post office box in Lake County to 1677 Wadsworth Boulevard, Lakewood in Jefferson County on or before December 31, 1974. Likewise established is the fact that the Respondent properly informed the supervising agency of the United States government, its shareholders and the general public of Mr. Schaffer's disassociation with the Respondent and Mr. Knecht's assumption of his duties no later than January 6, 1975. Respondent, however, conveniently failed to notify the Secretary of State of the change of registered agent and office until May 12, 1975, one hundred twenty-four days after advising its shareholders and one week after the expiration of the deadline for Petitioners' commencement of the within action, and three weeks after Mr. Knecht had prepared and signed the Statement of Change of Registered Office, Registered Agent, or Both.

It is well established that courts have generally estopped corporations from denying jurisdiction on the basis of service of process on person alleged by the corporation not to be an agent of the corporation authorized to receive process when the corporation denying jurisdiction has failed to timely and properly disclose or file statements relating to the designation of persons authorized to receive process. *Cf. Kraus v. Treasure Belt Mining Co.*, 408 P.2d

151 (Mont. 1961); *Hamilton v. Lionhead Skilift, Inc.*, 363 P.2d 716 (Mont. 1961); *Oro Navigation Co. v. Superior Court*, 187 P.2d 444 (Calif. App. 1948); *Anderson v. U.S.*, 220 F. Supp 769 (E.D. Penn. 1963); *Royal Business Funds Corp. v. South Eastern Development Corp.*, 323 S.E.2d 215 (N.C. App. 1977). Likewise, it is argued that Respondent herein should be estopped to deny the obvious change of registered office from Lake County to Jefferson County and registered agent from Rudie Schaffer to Robert Knecht prior to December 31, 1974, and certainly no later than April 24, 1975, in its continuing assertion that subject matter jurisdiction lies in the Lake County District Court when the Respondent failed to file the required form with the Secretary of State until May 12, 1975. Equity should not permit the Respondent to profit from its calculated tardiness in notifying the Secretary of State of the change of its registered office and agent, especially when the record contains numerous admissions in Respondent's own exhibits that the change of office and agent occurred prior to December 31, 1974, some five months prior to the institution of this Action. Because the actual location of the registered office is crucial to determination of the threshold question of subject matter jurisdiction, the Court is respectfully required to examine Defendant's Exhibits 2, 3 and 4 and the certificate of service of Ramona Gutheinz and Respondent's Statement of Change of Registered Office, Registered Agent, or Both as sought to be included by Petitioners' Motion for Correction and Modification of the Record, and to balance the admissions contained therein against the Certificate of the Secretary of State of December 27, 1977.

WHEREFORE, for the crucial and important reasons above stated, the Petitioners request that the Court exercise its sound and judicial discretion and issue its Writ of Certiorari.

DATED this 31st day of March, 1980.

Respectfully submitted,

John C. Schaefer, Esq.—Facsimile

Supreme Court Attorney Reg. No. 5072
Attorney for Petitioners
50 South Steele Street
Suite 220
Denver, Colorado 80209
Telephone: 399-4633

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of March, 1980, a true and correct copy of the foregoing Petition for Writ of Certiorari together with a true copy of Mr. Schaefer's Entry of Appearance was served upon counsel for all parties by placing same in the United States mails, first class, postage pre-paid, and properly addressed to:

Mssrs. Peter Cosgriff and Timothy H. Berry
Cosgriff, Dunn & French
P.O. Box 11
Leadville, Colorado 80461

Ms. D. Elizabeth Will
Keller, McSwain, Wing & Maxfield
633 17th Street
Suite 2570
Denver, Colorado 80202

Katherine E. Raue—Facsimile

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

No. 80-SC-91

CHARLES W. NORTON and RUBY W. NORTON; CHARLES W. and RUBY W. NORTON, INC., an Iowa Corporation; INVESTMENT SECURITIES COMPANY, an Iowa Corporation; WILLIAM B. NORTON, Individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES and LESLIE W. BATES; LUCILE YEDLIK and EDWIN G. YEDLIK; CHARLES WESTLEY NORTON and MACINE M. NORTON, CARL J. MEALY and ALICE N. MEALY; HAROLD D. NORTON and BRENDA S. NORTON, MIRIAM N. BAUMANN and ROBERT W. BAUMANN,	Amended Certificate Of Service Colorado Court of Appeals No. 78-714
Petitioners,	
vs.	
LEADVILLE CORPORATION, a Colorado corporation,	
Respondent.	

I hereby certify that on the 31st day of March, 1980 a true and correct copy of the Petitioner's Petition for Writ of Certiorari together with a true and correct copy of John

C. Schaefer's Entry of Appearance was served upon counsel for all parties by placing same in the United States mails, first class, postage prepaid, and properly addresesd to:

Mssrs. Peter Cosgriff and Timothy H. Berry
Cosgriff, Dunn & French
P.O. Box 11
Leadville, Colorado 80461

Ms. D. Elizabeth Will
Keller, McSwain, Wing & Maxfield
633-17th Street
Suite 2570
Denver, Colorado 80202

Katherine E. Raue—Facsimile

EXHIBIT G

IN THE SUPREME COURT OF THE

STATE OF COLORADO

No. 80 SC 91

CHARLES W. NORTON AND RUBY RUBY W. NORTON; CHARLES W. AND RUBY W. NORTON, INC., an Iowa corporation; INVESTMENT SECURITIES COMPANY, an Iowa corporation; WM. B. NORTON, individually and as Custodian for BRADLEY L. NORTON; FLORENCE N. BATES AND LESLIE W. BATES, LUCILLE YEDLIK AND EDWIN G. YEDLIK; CHARLES NORTON AND MACINE M. NORTON; CARL J. MEALY AND ALICE N. MEALY; HAROLD D. NORTON AND BRENDA S. NORTON; MIRIAM N. BAUMANN AND ROBERT W. BAUMANN, Petitioners, vs. LEADVILLE CORPORATION, a Colorado corporation, Respondent.	Certiorari to the Colorado Court of Appeals 78-714

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

Lohr, J. does not participate.

May 19, 1980.

By the Supreme Court
Sitting En Banc

cc: John C. Schaefer
50 South Steele Street
Suite 220
Denver, CO 80209

Peter Cosgriff
Timothy H. Berry
P.O. Box 11
Leadville, CO 80461

D. Elizabeth Will
633 17th Street
Suite 2570
Denver, CO 80202

Mac V. Danford, Clerk
Coloardo Court of Appeals

EXHIBIT H

COLORADO REVISED STATUTE, 1973

7-5-113. *Rights of dissenting shareholders upon sale, exchange, or lease of assets not in the usual course of business.* (1) If a sale, exchange, or lease of the principal part or all of the business, assets, property, or franchises of a corporation not in the usual course of its business or in connection with the dissolution and liquidation of the corporation is authorized by a vote of the shareholders of the corporation, any shareholder who has filed with the corporation a written objection thereto prior to or at the meeting of shareholders at which the sale, exchange, or lease is authorized and who has not voted in favor thereof may, within ten days after the date on which the vote was taken, make written demand on the corporation for the payment to him of the fair value of his shares as of the day prior to the date on which the vote was taken. If the sale, exchange, or lease is effected, the corporation shall pay to such shareholder, upon surrender of his certificate representing such shares, the fair value thereof. Such demand shall state the number and class of the shares owned by such dissenting shareholder. Any dissenting shareholder failing to make demand within the ten-day period shall be bound by the terms of the sale, exchange, or lease.

(2) Within ten days after the sale, exchange, or lease is effected, the corporation shall give notice thereof to each dissenting shareholder who has made demand as provided in this section for the payment of the fair value of his shares.

(3) If, within thirty days after the date on which the sale, exchange, or lease was effected, the value of such shares is agreed upon between the dissenting shraeholder and the corporation, payment therefor shall be made within

ninety days after the date no which the sale, exchange, or lease was effected, upon the surrender of his certificate representing such shares. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares or in the corporation.

(4) If, within such period of thirty days, the shareholder and the corporation do not so agree, then the dissenting shareholder may file a petition within sixty days after the expiration of the thirty-day period in any court of competent jurisdiction in the county where the registered office of the corporation is located asking for a finding and determination of the fair value of such shares, and he shall be entitled to judgment against the corporation for the amount of such fair value as of the day prior to the date on which such vote was taken approving the sale, exchange, or lease, together with interest thereon to the date of the judgment. The judgment shall be payable only upon and simulaneously with the surrender to the corporation of the certificate representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares or in the corporation. Unless the dissenting shareholder files such petition within the time limited in this section, such shareholder and all persons claiming under him shall be bound by the terms of the sale, exchange, or lease.

(5) The right of a dissenting shareholder to be paid the fair value of his shares as provided in this section shall cease if and when the corporation abandons the sale, exchange, or lease or the shareholders revoke the authortiy to make such sale, exchange, on lease.

(6) Shares acquired by the corporation pursuant to the payment of the agreed value thereof or to payment of the judgment entered therefor, as provided in this section, may be held and disposed of by the corporation as in the case of other treasury shares.